SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term 1974

No. 74-1183

RICHARD EASTERBROOK,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 3

Question Presented 4

Statement 5

Reasons for Granting the Writ 9

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Bivens v. Six Unknown Agents of the F.B.I., 403 U.S. 388 ..... 10, 11

Coolidge v. New Hampshire, 403 U.S. 443 13

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 12

Gouled v. United States, 255 U.S. 298 (1921) 12

Kerr v. State of California, 374 U.S. 23 ..... 11, 12

Contents

Page

Marron v. United States, 275 U.S. 197 12

People v. Easterbrook, A.D.2d (2nd Dept. 1974) 2

Powell v. Alabama, 287 U.S. 45 (1932) 12

Schwin v. United States, 392 U.S. 40 10

Stanley v. Georgia, 394 U.S. 557 10

Trupiano v. United States, 68 Sup. Ct. 1229 11

United States v. Hinton, 219 F.2d 324 12

United States v. Rabinowitz, 339 U.S. 56 10

Woolai Chin v. United States, 274 F.2d 708 12

Statute Cited:

28 U.S.C. §1257(3) 3

United States Constitution Cited:

Fourth Amendment 4, 9, 10, 11, 12, 13, 14

Fifth Amendment 9

Fourteenth Amendment 9, 11

Contents

Page

Other Authority Cited:

New York State Constitution, Article I, Section 12 11

APPENDIX

Appendix A — Judgment and Opinion of the Supreme Court of the State of New York 1a

Appendix B — Judgments and Opinions of the Appellate Division of the State of New York 4a

Appendix C — Judgment and Opinion of the Court of Appeals of the State of New York 19a

Appendix D — Search Warrant and Affidavits 21a

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK

To: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States.

Robert Easterbrook, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, entered on December 20, 1974, affirming the opinion of the Appellate Division of the Supreme Court, and the judgments and orders of the Appellate Division of the State of New York entered on

September 20, 1974, affirming the judgment of the Supreme Court of the State of New York, rendered on December 14, 1972, convicting the petitioner, Richard Easterbrook on his plea of guilty to criminal possession of a dangerous drug in the 5th degree, an E felony, and sentencing him to 0-3 years imprisonment.

OPINIONS BELOW

The Court of Appeals of the State of New York affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, which decision is attached hereto as Appendix C.

The judgment of the Appellate Division of the Supreme Court of the State of New York was rendered in an opinion officially reported as *People v. Easterbrook*, A.D. 2d (2nd Dept. 1974) and is annexed hereto as Appendix B.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on December 20, 1974. The order of the Appellate Division of the State of New York was entered on September 20, 1973.

The jurisdiction of this Court is involved under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

1. May a search warrant which authorizes a search of a described premises and of a described person, also encompass a search of another person neither named nor described in the search warrant, seen exiting from the described premises, prior to the execution of said warrant, either as against the described premises or described person, in light of the Fourth Amendment's protection from unreasonable search and seizure?

STATEMENT

Petitioner, Richard Easterbrook, was indicted in the Supreme Court of the State of New York, for the crime of criminal possession of a dangerous drug in the 4th degree.

Prior to the introduction of the petitioner's guilty plea, criminal possession of dangerous drugs, 5th degree, petitioner moved to suppress the evidence seized from petitioner, in that the police officers acted without benefit of a search warrant naming the petitioner, and that the search of petitioner was without probable cause and not incidental to a lawful arrest. The petitioner's motion was denied without a hearing, the trial court rendering its decision solely upon the affirmations submitted by defense counsel and by the District Attorney. Thereafter, petitioner pled guilty and was sentenced, the Appellate Division of the Supreme Court of the State of New York affirming the trial court's decision.

Permission was granted by an associate justice of the Appellate Division of the State of New York to appeal to the Court of Appeals of the State of New York. The Court of Appeals affirmed the decision of the Appellate Division of the State Supreme Court, officially reported at 43 A.D. 2nd, p. 719. See Appendix C.

The following is a summary of the affirmations and the decision of the Supreme Court of the State of New York, together with attached search warrant and affidavit, which are the factual basis for the issues to be argued.

On September 14, 1972, the defendant moved to suppress the evidence seized on the date of his arrest. The motion was based upon an affirmation from petitioner's counsel, in which he stated to the court that petitioner was arrested with two other persons. That the arresting officer had in his possession, a search warrant authorizing the search of premises "83-34 Lefferts Blvd. Apt. 2B Kew Gardens, Queens, occupied by James Cassese and the person of James Cassese and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered."

That the affirmation of petitioner's counsel further set forth the following:

> "4. That the affidavit in support of the search warrant indicates that a male white by the name of Joseph Cassese residing in that apartment, as stated by an informant, sells heroin and he observed Joseph Cassese in possession of a large amount of heroin. The officer stated that he observed people entering and leaving the premises, some of whom were known to be heroin users.
>
> 5. That on the date of the occurrance, the defendant, Richard Easterbrook, was leaving the apartment in question, in the company of William McCardle. As they left the apartment and the door thereto was closed, the police officers who were secreting themselves in the corridor, approached, stopped the defendant and searched both of them in the hallway. The alleged

contraband was then taken from defendant's pockets and they then were both brought back to the apartment. The police officers gained entrance into the apartment by simply knocking at the door, James Murray answered the door apparently believing that Easterbrook and McCardle simply wished to re-enter.

6. The officers then entered the premises, searched the apartment, allegedly recovering additional contraband.

7. That the apprehension of the defendant herein and search of his person outside of the apartment, was not justified by the search warrant, since the defendant herein was nowhere named therein nor had the police officers seen this defendant commit any crime in their presence.

8. Significantly, the District Attorney's office moved in the Criminal Court, City of New York, County of Queens, to dismiss the charges against William McCardle on December 2, 1971, for the reason that 'defendant was not named in the warrant, and that when he entered the premises there were three people in the premises none of which was named in the warrant. There were no drugs in open view. The drugs were found concealed in a purse in the apartment.'

9. That on April 14, 1971, the District Attorney of Queens County, after a conference with the police officer, moved to dismiss the charges against James Murray, stating: 'Drugs were found in a house in a bureau drawer in a bag. This defendant was in the house. We cannot even put him in the room the drugs were found in.'

10. That the search of the defendant, Richard Easterbrook, was illegal and contrary to law.

11. That no previous application has been made for the relief herein requested.

WHEREFORE, affirmant respectfully prays that an order be made herein, suppressing the evidence seized herein as the fruits of an illegal search and seizure, together with such other and further relief as to this Court may seem just and proper.

Dated: September 14, 1972

s/ Allan Sturim
Allan Sturim"

The District Attorney, in his answering affirmation, stated that the facts as alleged by petitioner, even if true, did not entitle the defendant to an order of suppression, that he had

investigated the facts and found that the petitioner was still in the apartment when the police entered it; that even if the police were outside the apartment and the petitioner was outside of the apartment, when petitioner was searched and the contraband seized, it was of little significance where the petitioner was searched, since there was a valid search warrant for the specified premises; anyone found within the premises was a proper party to be searched.

The decision of the Supreme Court of the State of New York, denying petitioner's motion, is annexed as Appendix A.

REASONS FOR GRANTING THE WRIT

The writ should issue because the State of New York deprived the petitioner in a criminal proceeding, of the Fourth, Fifth and Fourteenth Amendments' rights to a fair hearing and to due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of counsel, compulsory process and confrontation of witnesses.

The search warrant utilized in the present case directed the search of one, Joseph Cassese and of his apartment and not the petitioner's person. The mere exiting of the petitioner from the apartment named in the warrant, was not sufficient exigent circumstances nor probable cause for the police officers to interfere with the petitioner's privacy in deprivation of his constitutional rights. The police had no prior information regarding any criminal activities of the petitioner. At most, the police were suspicious of the petitioner in that he had recently exited from a premises for which the police had a search

warrant. The mere suspicion of the police was insufficient to justify the search of the petitioner. To permit such a search and seizure, would allow a search warrant to be used as a means of conducting an exploratory search of persons and areas not contemplated by the warrant, and would clearly result in an illegal intrusion into an individual's personal privacy, in violation of the Constitution of the United States. (*Stanley v. Georgia*, 394 U.S. 557.)

The Fourth Amendment's requirement of particularity in describing the place to be searched and the property to be seized, becomes meaningless if officers in possession of a warrant for a particular premises and particular person may lie in wait for all persons who may have left the apartment, even before the warrant is executed, on the chance that said persons may be found to have the described property in their possession. In *Schwin v. United States*, 392 U.S. 40, 62, this Court rejected the contention that probable cause existed merely because a police officer observed a known addict in conversation with other known addicts. In *Schwin, supra*, the officer had no information about the defendant, a situation which is parallel to that of petitioner's. Probable cause was established by the police only after the search and seizure had taken place, a clear violation of defendant's constitutional rights.

The Fourth Amendment to the United States Constitution prohibits searches beyond that which is set forth in the warrant. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388. Exploratory searches are prohibited with or without a warrant. *United States v. Rabinowitz*, 339 U.S. 56.

The Fourth Amendment's prohibition of the Federal Government from convicting a person of a crime by the use of testimony obtained through an unreasonable and unlawful search and seizure, is enforceable against the States through the Fourteenth Amendment. The same sanctions and exclusions apply in the State courts that apply in the Federal courts. *Kerr v. State of California*, 374 U.S. 23.

Both the Constitution of the State of New York and the Constitution of the United States, require that a search warrant "particularly describe the place and person to be searched." United States Constitution, Fourteenth Amendment; New York State Constitution, Article 1, Section 12.

This court, in *Trupiano v. United States*, 68 Sup. Ct. 1229, 1234, held that:

> "The 4th Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement. The People of the United States insisted on writing the 4th Amendment into the Constitution because sad experience had taught them that the right to search and seizure should not be left to the mere discretion of the police . . . ."

In *Bivens v. Six Unknown Named Agents of the F.B.I.*, 403 U.S. 388, 394, this court held that the Fourth Amendment confines those who execute search warrants, to act strictly within

the confines of the warrant. A description of the things to be seized as well as a particular description of the person to be searched, so as to adequately permit identifications, are the standard. A search warrant may not be used as an excuse to conduct general searches. *Marron v. United States,* 275 U.S. 197; *Woolai Chin v. United States,* 274 F.2d 708; *United States v. Hinton,* 219 F.2d 324.

Mr. Justice Clark in *Kerr v. California,* 374 U.S. 23, 32, 33, stated:

> "'Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . ." *Gouled v. United States,* 255 U.S. 298, 304 (1921); cf. *Powell v. Alabama,* 287 U.S. 45, 65-68 (1932). While the language of the Amendment is "general" it "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made . . . ." *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931). Mr. Justice Butler there stated for the Court that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there

> shall be impairment of the rights for the protection of which it was adopted.'" *Ibid.*

It is respectfully submitted that the New York Court of Appeals did not adhere to these standards when it approved, in the instant case, the broad language of the search warrant as justifying the search and subsequent arrest of petitioner though neither named or described in the search warrant. Such approval if followed to its logical conclusion, would permit a police officer to obtain a warrant for a given premises and lie in wait outside said premises for other persons not named in the warrant, and follow said persons even to other premises and then conduct a search of said persons and/or premises. This court has steadfastly held unreasonable and unconstitutional those searches conducted without prior judicial approval except under the most exigent of circumstances. Mr. Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 455 stated:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there just be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' [T]he burden is on those seeking the exemption to show the need for it."

To condone the search of the petitioner under the "catch all" language of a warrant that does not describe nor mention him, would be contrary to the intent and purpose of the Fourth Amendment of the Constitution of the United States.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the orders and judgments of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court of the State of New York.

Respectfully submitted,

s/ Leslie Nizin

STURIM & NIZIN
Attorneys for Petitioner

APPENDIX A

JUDGMENT AND OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BY FRANCIS X. SMITH, J.
DATED September 22, 1972
Ind. No. 2639-72

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RICHARD EASTERBROOK,

Defendant-Appellant.

This is a motion on behalf of the defendant for an order suppressing evidence seized on the ground that the evidence was obtained by and is the product of an unlawful search and seizure.

The record shows that on or about March 6th, 1970 the police requested a search warrant on the basis of an affidavit stating that a James Cassese, the occupant of Apartment 2B in 83-34 Lefferts Boulevard, Kew Gardens, Queens, sells heroin, and was observed in possession of a large amount of heroin; and that persons were observed entering and leaving the premises, some of whom were known to be heroin users.

The search warrant issued followed the general format set forth in Section 797 of the Code of Criminal Procedure then in

effect. It authorized the search of "83-34 Lefferts Boulevard, Apt. 2B, Kew Gardens, Queens, occupied by James Cassese and the person of James Cassese and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered."

In an affidavit in support of this motion to suppress, defendant's attorney alleges: "That on the date of the occurrence, the defendant, Richard Easterbrook, was leaving the apartment in question, in the company of William McCardle. As they left the apartment and the door thereto was closed, the police officers who were secreting themselves in the corridor, approached, stopped the defendant and searched both of them in the hallway. The alleged contraband was then taken from defendant's pockets and they then were both brought back to the apartment. The police officers gained entrance into the apartment by simply knocking at the door, James Murray answered the door apparently believing that Easterbrook and McCardle simply wished to re-enter.

The officers then entered the premises, searched the apartment, allegedly recovering additional contraband."

Defendant's attorney asserts that the apprehension of defendant and the search of his person outside the apartment was not justified by the search warrant, because defendant was not named in the search warrant and the police officers had not seen him commit any crime.

Judgment and Opinion of the Supreme Court of the State of New York

The People oppose the motion.

The Court finds defendant's objections are without merit. The Court finds that the search warrant authorized the search of any person found at Apartment 2B. and that it is of no consequence that defendant had just stepped out of the doorway of that apartment when stopped and searched.

Because it finds that the search of defendant was authorized by the search warrant, the Court finds that the motion to suppress must be denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of this decision and the order to be entered thereon to the attorney for the defendant.

s/ FRANCIS X. SMITH
J.S.C.

APPENDIX B

JUDGMENTS AND OPINIONS OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK

At a Term of the Appellate Division Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 13, 1973

Mot. Dsm. App.
Nos. 3675, 3675A

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. FRED J. MUNDER) Associate Justices
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM)

The People, etc.,

respondent,

vs.

Richard Easterbrook

appellant.

In the above-entitled cause, the above-named appellant, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered November 8, 1972 and the

respondent having moved to dismiss the appeal and the appellant having cross-moved for an enlargement of time to perfect appeal;

Now, upon the papers filed in support of the motions and papers filed in opposition or in relation thereto; and the motions having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion to dismiss is hereby denied, on condition that the appellant perfect the appeal for the September Term, which begins September 4, 1973 and be ready to argue or submit the appeal at said term; appeal ordered on the calendar for said term.

Appellant's brief must be served and filed on or before July 27, 1973 and respondent's brief must be served and filed on or before August 10, 1973.

ORDERED that the cross-motion is dismissed, as academic.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division
7/13/73
Nos. 3675, 3675A

Judgments and Opinions of the Appellate Division of the State of New York

_ AD 2d_ A — September 20, 1973

1442 E

The People, etc.,

respondent,

v.

Richard Easterbrook,

appellant.

Appeal by defendant from (1) a judgment of the Supreme Court, Queens County, rendered November 8, 1972, convicting him of criminal possession of a dangerous drug in the fifth degree, upon his plea of guilty, and imposing sentence, and (2) an order of the same court dated September 22, 1972, which denied his motion to suppress evidence, without a hearing.

Judgment and order affirmed.

The evidence sought to be suppressed was seized pursuant to a warrant which authorized a search for narcotics of a particular apartment, the person of a named occupant of the apartment and "of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered" (see Code Crim. Pro.,

§797). In support of the motion to suppress, it was alleged that defendant and another were searched in the hallway of the building, immediately after leaving the apartment, by police officers who had not yet entered the apartment and, further, that the search of the apartment was conducted subsequent to the search and arrest of defendant.

The issue presented is whether, in the light of the Fourth Amendment requirement for specificity of the subject to be searched, a warrant may properly authorize a search, not only of a particular premises and certain specified individuals, but also of any person who is present on the premises when the search takes place.

It has generally been held that the requirement for specificity is satisfied if the individuals encompassed by the warrant are identified by physical nexus to the ongoing criminal event itself *(State v. DeSimone*, 60 N.J. 319). Thus, the validity of a search conducted pursuant to such a warrant is dependent upon the facts of each case and, in particular, upon the issue of whether there is good reason to believe that anyone present at the specified premises is a participant in the criminal activity taking place at the scene.

Pursuant to that rationale such searches have been upheld in *People v. Nicoletti* (60 Misc. 2d 108) and *People v. Pugh* (69 Ill. App. 2d 312), involving persons present in an apartment in which drugs were being used and sold; in *Samuel v. State* (222 So. 2d 3 [Fla. Sup. Ct.]), involving a gambling operation in a

building; in *Johnson v. State* (440 S.W. 2d 308 [Tex. Cr. App.]), involving an apartment in which "pot" parties were being held; and in *State v. DeSimone (supra)* involving an automobile used in connection with the sale of lottery slips. Conversely, such searches have been held to be invalid in *Crossland v. State* (266 P.2d 649 [Okl. Crim. App.]), involving a cafe at which 25 to 30 persons were eating; in *Garrett v. State* (270 P.2d 1101 [Okl. Crim. App.]), involving premises used as a filling station and beer tavern; and in *State v. Massie* (95 W. Va. 233), involving all persons present in a poolroom.

The affidavit in support of this search warrant alleged that heroin was being used and sold in the apartment. In our opinion, it may be said that the criminal activity was of such a nature and the premises so limited that it was likely that everyone present was party to the offense. Under the circumstances, we are of the opinion that the search of one identified only by his physical nexus to the premises was valid in this case and that the police officers had reasonable cause to believe that defendant was one who might "have such property in his possession or under his control or to whom such property may have been delivered."

We are further of the opinion that the search was not rendered invalid by virtue of the fact that it took place outside the apartment. A search conducted a few feet from the door of the premises of a person who had just emerged therefrom is sufficiently proximate to the described premises to fall within the purview of the warrant.

We have considered and rejected defendant's contentions with respect to the sentence imposed.

HOPKINS, Acting P.J., LATHAM, CHRIST and BENJAMIN, JJ., concur.

SHAPIRO, J., Dissents and votes to reverse the judgment and the order, to grant the motion to suppress and to dismiss the indictment, with the following memorandum:

The issue here is the validity of a search of defendant in which heroin was found in his possession. The police officers "who were secreting themselves in the corridor, approached, stopped the defendant" (affidavit in support of the suppression motion) in the hallway outside the closed door of an apartment which he had just left and searched him. Finding heroin on his person, they then placed him under arrest. The officers had a search warrant which directed them to make an immediate search of the apartment "occupied by Joseph Cassese and of the person of Joseph Cassese and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for heroin and narcotic implements" [*sic*].

After they searched and arrested defendant, the officers gained entrance to the apartment by knocking on the door and entering it when the door was opened by a person inside. They took defendant into the apartment with them. Their search of the apartment resulted in their finding additional contraband.

Defendant moved to suppress the heroin found on him by the police, on the grounds that the search of his person had not been authorized by the search warrant and that the police did not have probable cause to believe that he had committed any crime. Criminal Term denied his motion, saying, "The search warrant authorized the search of any person found at" the apartment and that "it is of no consequence that defendant had just stepped out of the doorway of that apartment when stopped and searched." The trouble with that statement is that it is just not in accord with the facts. While "a search warrant which directs a search of a designated or described place, premises or vehicle, may also direct a search of any person present thereat or therein" (CPL 690.15, subd. 2), the warrant here did not direct a search of everyone present in the premises but only of the person of Joseph Cassese. Hence, the warrant in this case did not permit the police to search defendant even if he were found in the premises proper, unless contraband were first found therein, for until that time they did not have *present* probable cause to arrest him for the crime of possession of contraband.*

Both the Fourth Amendment to the Federal Constitution and section 12 of article I of the Constitution of our own State declare, in identical language, that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It is well settled that these constitutional

* In this connection it must be remembered that even when successfully executing a search warrant, the police may not *arrest* anyone within the searched premises unless the person arrested may be deemed to have actual or constructive possession of contraband.

provisions, which are for security of person and property, should be liberally construed. In *Ker v. California* (374 U.S. 23, 32-33) Mr. Justice CLARK, speaking for the court said:

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty' the guaranty of which 'is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . .' *Gouled v. United States*, 255 U.S. 298, 304 (1921); cf. *Powell v. Alabama*, 287 U.S. 45, 65-68 (1932). While the language of the Amendment is 'general' it 'forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made . . . .' *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Mr. Justice Butler there stated for the Court that '[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.' Ibid."

This doctrine of liberal construction was recently reaffirmed in *Coolidge v. New Hampshire* (403 U.S. 443, 453-454), where

Mr. Justice STEWART, speaking for the court, reaffirmed Mr. Justice BRADLEY'S admonition in *Boyd v. United States* (116 U.S. 616, 635) as follows:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

Justice STEWART went on to say (pp. 454-455):

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and

> carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'"

(See, also, *Grau v. United States*, 287 U.S. 124, 128; *United States ex rel. McArthur v. Rundle*, 402 F.2d 701.)

Applying the foregoing doctrine of liberal interpretation to implement the guaranties of the Fourth Amendment, the Seventh Circuit Court of Appeals in *United States v. Hinton* (219 F.2d 324) held invalid a search warrant for the search of an entire apartment house containing four apartments because the affidavit on which the warrant was based failed to identify the particular apartment or apartments in the building in which the claimed sales of narcotics had been made. The court said (p.326):

> "Federal courts have consistently held that the Fourth Amendment's requirement that a specific 'place' be described when applied to dwellings refers to a single living unit (the residence of one person or family). * * * The basic requirement is that the officers who are commanded to search be able from the 'particular' description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed."

* * *

> "We are not being overtechnical in this. We are merely insisting, as we must, that in issuing search warrants the requirements of the Fourth Amendment be met."

Our own Court of Appeals, in *People v. Dumper* (28 N.Y. 2d 296), dealt with a case somewhat analogous to the one here under consideration. The search warrant there authorized the search of a "'one story wood frame cottage with white sidewall, green roof'", etc., and a "'cottage east of a main house'", etc. (p. 299). The court rejected as invalid a search, under the warrant, of an automobile which had just been driven into the driveway, saying (p. 299):

> "Since a warrant must describe the premises to be searched, and this warrant did not include the automobile, which was not on the premises when the police came with the warrant but which was driven into the driveway while police were there, it did not justify search of the car *(People v. Rainey,* 14 N.Y. 2d 35).
>
> "Both the Federal and State Constitutions require that a search warrant 'particularly describ[e] the place to be searched' (U.S. Const., 4th Amdt.; N.Y. Const. art. I, §12). The scope of search has been carefully limited. A warrant to search a building has been held insufficient to justify search of a shed attached to the building,

> accessible through the apartment of another person. 'Probable cause must be shown in each instance' (*People v. Rainey, supra,* p. 37)."

It may be argued that, since the warrant authorized the search of Joseph Cassese and his apartment, as well as "of any other person who may be found to have such property [heroin and narcotic implements] in his possession," it authorized the search of any person seen leaving the apartment. But, assuming *arguendo* the constitutional validity of such a provision, unless this language is read as applying only to persons found within the premises to be seached, the limiting requirements of the Fourth Amendment and of section 12 of article I of the State Constitution, that the warrant particularly describe the place to be searched and the property to be seized, become meaningless, because the officers holding the warrant are then free to lie in wait and seize and search any and all persons who have left the premises, even before they execute the search warrant, *on the chance that they may be found to have the described property in their possession.* But that such a mere possibility does not serve to provide probable cause to stop and search those exiting from an apartment is made clear in *Sibron v. New York* (392 U.S. 40, 62), where Chief Justice WARREN for the court rejected the contention that a police officer had probable cause to believe that the appellant was in possession of narcotics because he had seen him conversing with a number of known addicts over a period of several hours. In *Sibron* the court noted that the officer had no information concerning the individual searched *at the time the search was made.* Said the Chief Justice (pp. 62-63):

> "The inference that persons who talk to narcotic addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. *Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin* [emphasis supplied]. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. E.g., *Henry v. United States*, 361 U.S. 98 (1959); *Johnson v. United States*, 333 U.S. 10, 16-17 (1948)."

(See also *United States v. Jones*, 308 F.2d 26, 31; *United States v. Febre*, 425 F.2d 107, 111; *United States v. Wilkes*, 451 F.2d 938; *United States v. Williams*, 325 F. Supp. 1283; *United States v. Johnson*, 475 F.2d 977, and cases cited; *United States v. Love*, 472 F.2d 490; *United States v. Linnear*, 464 F.2d 355; *State v. Cabigas*, 477 F.2d 648 [Wash. Ct. App.]; *State v. Bradbury*, 243 A.2d 302 [N.H. Sup.].)

Here, too, it is equally clear that the mere recent presence of defendant in the apartment to be searched under the warrant was not sufficient to support an intrusion by the police upon his personal privacy upon the theory that there was probable cause to believe that he was in possession of narcotics. He could have been a neighbor, a delivery man, a social guest or a friend. There was here no evidence of the commission of a crime, such as "flight" (*United States v. Soyka*, 394 F.2d 443) or any other

"furtive conduct" (anno. 45 ALR 3d 581) and the mere "suspicion" of the police was an insufficient predicate to warrant his being searched (*People v. Brown*, 32 N.Y.2d 172; *People v. Corrado*, 22 N.Y.2d 308; *Hall v. United States*, 459 F.2d 831).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (403 U.S. 388, 394, fn. 7) the Supreme Court of the United States indicated that the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, citing Mr. Justice STEWART's concurring opinion in *Stanley v. Georgia* (394 U.S. 557, 571-572), wherein he said:

> "Even in the much criticized case of *United States v. Rabinowitz*, 339 U.S. 56, the Court emphasized that 'exploratory searches . . . cannot be undertaken by officers with or without a warrant.' *Id* at 62. This record presents a bold violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant."

The majority of this court, by its affirmance in this case, is declaring that police armed with a search warrant for

particularly described premises may lie in wait outside the premises to be searched in order to stop and search persons leaving them *before* actually executing the warrant and making the search called for therein. *In fact, if the holding of the majority be correct, the police need never have entered the premises at all.* By so holding, the majority is inviting the police, as was said by Mr. Justice STEWART in *Stanley v. Georgia (supra,* p. 572), "to use a seemingly precise and legal warrant *** to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant" and then to make an arrest upon the basis of what they find by such illegal and unauthorized intrusion upon the person of the one searched. In my opinion, such a determination can only be arrived at upon the theory that the ends justify the means. I cannot subscribe to such a determination and hence vote to reverse the judgment appealed from and to dismiss the indictment.

December 17, 1973

PEOPLE v. EASTERBROOK, RICHARD 1442E

APPENDIX C

JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK

COURT OF APPEALS

2 No. 618

The People &c.,

Respondent,

vs.

Richard Easterbrook,

Appellant.

MEMORANDUM:

The order of the Appellate Division should be affirmed. The warrant, based upon an affidavit which alleged that heroin was being used and sold in a specified apartment, authorized a search of that apartment, its lessee and "any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered". The defendant, who was seen, apprehended and searched as he was exiting the apartment, was within the area and class of

individuals authorized to be searched (cf. *People v. Marshall*, 13 N Y 2d 28) and, thus his motion to suppress was properly denied. *People v. Green* (33 N Y 2d 496), relied upon by the defendant, is distinguishable for the warrant involved in that case limited the search area to a specified apartment and persons found "therein". Such is not the case here.

* * * * *

Order affirmed in a memorandum. All concur.

APPENDIX D

SEARCH WARRANT AND AFFIDAVITS

CRIMINAL COURT OF THE CITY OF NEW YORK

PART . County of Queens

STATE OF NEW YORK
SS.:
COUNTY OF QUEENS

Inventory made publicly of property taken by the undersigned, under and pursuant to the annexed warrant:

1. 395 glassine envelopes heroin

2. 2 eye droppers

3. 2 hypo needles

4. 1 plastic bag containing heroin.

I, Stephen J. Vash, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Stephen J. Vash	24097	Ptl.	N.D. 6
Name	Shield	Rank	Command

Sworn to before me,
Mar. 10, 1970

s/ (illegible)
Judge.

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 1 B, County of Queens

State of New York
ss.:
County of Queens

Patrolman Stephen Vash #24097, Narcotics Division being duly sworn, deposes and says:

1. I am a police officer assigned to the Narcotics Division, New York City Police Department.

2. I have information based upon the following: Deponent is in receipt of information from a confidential informer who in the past has proven reliable as evidenced by arrests of the following persons:

Edward Rosenblum, 220.35 PL, Arrested February 20, 1970; Thomas Cadicamo, 220.15 PL, Arrested February 20, 1970; Charlotte Smith, 220.20 PL, Arrested February 20, 1970. The above mentioned arrest also included the seizure of 7 ounces of Heroin, one loaded shotgun and one loaded revolver.

Search Warrant and Affidavits

The above mentioned informant has told the deponent that a person known to him as Joseph Cassese male white 30-32, who resides at 83-34 Lefferts Blvd., apt. 2B Kew Gardens, premises being a six story brick apartment house, informant further states that Joseph Cassese uses premises 83-34 Lefferts Blvd. apt. 2B, to sell heroin. The informant also states that Joseph Cassese uses premises 83-34 Lefferts Blvd. apt 2 B to sell, use and conceal heroin and that during the week of February 12, 1970 he was in premises 83-34 Lefferts Blvd. apt 2B and that he did observe Joseph Cassese in possession of a large amount of heroin.

On March 4, 1970 your deponent did observe approximately 9 persons enter and leave the premises 83-34 Lefferts Blvd. between the hours of 8:00 pm and 9:00 pm. Of the persons seen to enter and leave 4 were known to your deponent as narcotics users.

On March 5, 1970 your deponent did observe approximately 14 persons enter and leave the premises 83-34 Lefferts Blvd. between the hours of 7:30 pm to 9:00 pm. Of the persons seen entering and leaving said premises 6 were known to your deponent as narcotics users.

Due to the easily disposable nature of the contraband involved your deponent requested that he be allowed to enter 83-34 Lefferts Blvd. apt. 2B without giving prior notice of his purpose and authority.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that

such property namely Heroin and narcotic implements and may be found in the possession of Joseph Cassese M/W/30-32 or at premises 83-34 Lefferts Blvd. Apt. 2B, Kew Gardens Queens.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of Joseph Cassese and premises 83-34 Lefferts Blvd. 2B and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

s/	Stephen Vash	24097	Ptl.	N.D. 6
	Police Officer	Shield	Rank	Command
	Stephen Vash	24097	Ptl.	ND6

Sworn to before me
March 6, 1970

s/ (illegible)
Judge

Search Warrant and Affidavits

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 1 B, County of Queens

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit having been made this day before me by Ptl. Stephen Vash #24097 Narcotics Division that there is probable cause for believing that certain property namely heroin and narcotics implements.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. to make an immediate search of premises 83-34 Lefferts Blvd. apt. 2B Kew Gardens Queens occupied by Joseph Cassese and of the person of Joseph Cassese and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for heroin and narcotic implements and if you find any such property or any part thereof to bring it before me at Part 1-B Queens Crim. Court at 125-01 Queens Blvd., Kew Gardens, Queens, New York City.

Dated at New York City,

March 6, 1970 4:20 PM

s/ (illegible)

Judge

Supreme Court, U.S.
FILED
APR 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1183

RICHARD EASTERBROOK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Introduction	1
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of Facts	3
Argument	
Point One—The Court of Appeals properly ruled that the search of the petitioner was within the authority of the search warrant	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Crossland v. State, 266 P. 2d 649	7
Elkins v. U.S., 304 U. S. 206	6
Garrett v. State, 270 P. 2d 1101; Okl. Crim. App.	7
Johnson v. State, 440 S.W. 2d 308; Tx. Cr. App.	7
Jones v. U.S., 362 U. S. 257	6
Kenny v. U.S., 81 U. S. App., D.C. 259; 157 F. 2d 442	6

PAGE

People v. Finn, 340 N. Y. S. 2d 807 6
People v. Montanaro, 34 Misc. 2d 624 6
People v. Marshall, 3 N. Y. 2d 28 7
People v. Nicoletti, 60 Misc. 2d 108 6
People v. Nieves, —— N.Y. 2d —— 7
People v. Pugh, 69 Ill. App. 2d 312 6
People v. Taggart, 20 N. Y. 2d 335 6

Samuel v. State, 222 So. 2d 3; Fla. Sup. Ct. 6
Shore v. U.S., 49 F. 2d 519 6
State v. DeSimone, 60 N. J. 319 ..... 6, 7
State v. Massie, 95 W. Va. 233 7

Statutes:

Code of Criminal Procedure 5, 6
United States Constitution, Amendments IV, XIV 3

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BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

Introduction

This a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the Court of Appeals of the State of New York.

Petitioner was convicted of the crime of criminal possession of a dangerous drug in the fifth degree, upon a plea of guilty before the Honorable Francis X. Smith in the Supreme Court of the State of New York, County of

Queens. The judgment of conviction was rendered on November 8, 1972, and petitioner was sentenced to the custody of the New York State Department of Correction for an indeterminate term with a maximum of three years.

Opinions Below

The indeterminate appellate tribunal below affirmed the conviction on December 17, 1973, without opinion. The memorandum of that court—the Supreme Court of the State of New York, Appellate Division, Second Department—is reported at 43 A. D. 2d 719 (1973).

On December 20, 1974, the Court of Appeals of the State of New York affirmed, without opinion, the order of the Supreme Court of the State of New York, Appellate Division, Second Department. The memorandum of that court is reported at 35 N. Y. 2d 913 (1974).

Jurisdiction

The jurisdiction of this Court to review, by way of certiorari, is invoked under 28 USC 1257(3).

Question Presented

Whether in light of the Fourth Amendment requirement for specificity of the subject to be searched, a warrant may properly authorize a search, not only of a particular premises and certain specified individuals, but also of any person who is present on the premises when the search takes place.

Statutes Involved

United States Constitution, Amendments IV, XIV.

Statement of Facts

Appellant was indicted on August 18, 1972 (Indictment Number 2639-72), by the Grand Jury, Queens County, and charged with the crime of criminal possession of a dangerous drug in the fourth degree.

Prior to the entering of a guilty plea by the petitioner, a motion was made to controvert the search warrant and suppress the evidence obtained thereby. The petitioner was arrested while exiting from an apartment for which the police had a search warrant.

In support of his motion to controvert, the petitioner, in an affidavit dated September 14, 1972, alleged that on March 6, 1970, while he was "leaving the apartment in question," the police officers who were secreting themselves in the corridor, approached, stopped the petitioner and searched him in the hallway. He further alleged that the contraband found as a result of the search was to be used against him on the trial of Indictment Number 2639-72. Petitioner sought suppression on the contraband on the ground that, since he was not named in the search warrant, the search of his person outside of the apartment was not justified by the search warrant.

In an affirmation dated September 20, 1972, the People opposed the petitioner's application on the ground that

there was a valid search warrant authorizing the search of any person found in the designated premises and that a search of the petitioner did not violate the petitioner's Fourth Amendment rights. The People further argued that the officers observed the petitioner leaving the apartment and immediately apprehended him on the basis of a search warrant with sufficient scope and that, therefore, the petitioner's affidavit presents facts which, even if true, do not entitle him to an order of suppression.

In an order dated September 22, 1972, the trial court denied, without a hearing, the petitioner's motion to suppress, indicating that the search of petitioner was authorized by the search warrant. The court, in its order, stated:

> * * * that the search warrant authorized the search of any person found at apartment 2B, and that it is of no consequence that defendant had just stepped out of the doorway of that apartment when stopped and searched.

After the court denied the petitioner's motion to suppress evidence, the petitioner withdrew his previously entered plea of guilty, and interposed a plea of guilty to the crime of criminal possession of a dangerous drug in the fifth degree.

ARGUMENT

POINT ONE

The Court of Appeals properly ruled that the search of the petitioner was within the authority of the search warrant.

At the outset, it should be noted that the petitioner, in his initial moving papers for an order of suppression, did not raise as an issue, the location of the petitioner with respect to the apartment in question. Rather, he based his argument solely on the ground that the petitioner was not named or described with particularity in the warrant. This argument on the law is completely without merit and did not create an issue of fact requiring a hearing. Furthermore, the petitioner, in both his moving papers and his brief concedes that he was exiting from the apartment at the time he was stopped by the police. It is submitted, that a search conducted a few feet from the door of the premises of a person who had just emerged therefrom is sufficiently proximate to the described premises to fall within the purview of the warrant.

Petitioner also contends that the language in the search warrant which authorized the search of "any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered * * *"* violated the petitioner's constitutional rights in that it failed to state with particularity, the person to be searched.

---

* The search warrant issued followed the general format set forth in Section 797 of the Code of Criminal Procedure then in effect. (From the order of Justice Smith dated September 22, 1972.)

The Fourth Amendment of the Federal Constitution and Article 1, Section 12, of the New York Constitution, clearly prohibit only those searches and seizures deemed "unreasonable". *Elkins* v. *U.S.*, 304 U. S. 206; *People* v. *Taggart*, 20 N.Y. 2d 335; *People* v. *Finn*, 340 N. Y. S. 2d 807. A search is reasonable if conducted pursuant to a legal warrant. *Jones* v. *U.S.*, 362 U. S. 257. To justify the issuance of a search warrant, the name of the criminal need not be known or included in the warrant and a search warrant is not constitutionally defective for failure to name persons to be searched or to describe them with particularity. *People* v. *Nicoletti*, 60 Misc. 2d 108; *People* v. *Montanaro*, 34 Misc. 2d 624; CCP Section 797. The requirement of particularity with respect to the premises to be searched is satisfied by giving the address of the building and naming the person whose apartment is to be searched. *Kenny* v. *U.S.*, 81 U. S. App., D. C. 259, 157 F. 2d 442; *Shore* v. *U. S.*, 49 F. 2d 519.

The Appellate Division in affirming the conviction stated:

> It has generally been held that the requirement for specificity is satisfied if the individuals encompassed by the warrant are identified by physical nexus to the ongoing criminal event itself (*State* v. *DeSimone*, 60 N.J. 319). Thus, the validity of a search conducted pursuant to such a warrant is dependent upon the facts of each case and, in particular, upon the issue of whether there is good reason to believe that anyone present at the specified premises is a participant in the criminal activity taking place at the scene.
>
> Pursuant to that rationale such searches have been upheld in *People* v. *Nicoletti*, (60 Misc. 2d 108) and *People* v. *Pugh*, (69 Ill. App. 2d 312), involving persons present in an apartment in which drugs were being used and sold; in *Samuel* v. *State*, (222 So. 2d 3;

Fla. Sup Ct), involving a gambling operation in a building; in *Johnson* v. *State*, (440 S.W. 2d 308; Tx. Cr. App.), involving an apartment in which "pot" parties were being held and in *State* v. *DeSimone* (supra) involving an automobile used in connection with the sale of lottery slips. Conversely, such searches have been held to be invalid in *Crossland* v. *State* (266 P. 2d 649; Okl. Crim. App.), involving a cafe at which 25 to 30 persons were eating; in *Garrett* v. *State* (270 P. 2d 1101; Okl. Crim. App.), involving premises used as a filling station and beer tavern; and in *State* v. *Massie* (95 W. Va. 233), involving all persons present in a poolroom.*

The affidavit in support of this search warrant alleged that heroin was being used and sold in the apartment. In our opinion, it may be said that the criminal activity was of such a nature and the premises so limited that it was likely that everyone present was party to the offense. Under the circumstances, we are of the opinion that the search of one identified only by his physical nexus to the premises was valid in this case and that the police officers had reasonable cause to believe that defendant was one who might "have such property in his possession or under his control or to whom such property may have been delivered."

The Court of Appeals in affirming the decision of the Appellate Division held that, "the defendant, who was seen, apprehended and searched as he was exiting the apartment, was within the area and class of individuals authorized to be searched (*cf. People* v. *Marshall*, 3 N.Y. 2d 28) and, thus his motion to suppress was properly denied.

---

* *Cf. People* v. *Nieves*, —— N.Y. 2d —— (March 26, 1975), involving a restaurant which was open to the public.

Thus, it is submitted that the search of the petitioner was not a violation of his constitutional rights merely because he was not specifically named in the warrant.

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

NICHOLAS FERRARO
District Attorney
Queens County

ALAN M. SNYDER
Assistant District Attorney
of Counsel

April, 1975